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March 14, 2016

SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Written *Ex Parte* Communication in MB Docket Nos. 15-216 and 10-71

Dear Ms. Dortch:

Attached please find a letter to Chairman Wheeler and each of the Commissioners (as well as their legal advisors and additional members of the Commission staff) that is being sent today in connection with the above referenced proceedings.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,

/s/
Ari Z. Moskowitz
Counsel to Mediacom Communications Corporation

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March 14, 2016

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket Nos. 15-216 and 10-71

Dear Chairman Wheeler and Commissioners:

I am writing on behalf of Mediacom Communications Corporation ("Mediacom") in response to a letter you recently received from Rick Kaplan, General Counsel of the National Association of Broadcasters ("NAB"). Mr. Kaplan's letter, dated March 9, 2016, was the latest in an exchange of written *ex parte* submissions that began with a February 3, 2016 letter from Mediacom bringing to the attention of the Media Bureau a new type of "Additional Station" provision that would effectively allow any station carried by a particular cable operator to piggyback on any agreement that the operator has with a non-commonly owned station that calls for a higher level of retransmission consent payments based on nothing more than a "proxy" grant. Mediacom pointed out that it had recently been presented with a demand that it agree to such a provision and that other operators were encountering similar demands.[1]

In a rather sharply worded response dated February 10, 2016, NAB suggested that Mediacom was mischaracterizing proposals made by broadcasters and that the "Additional Station" provision described by Mediacom was "the rough equivalent of a most favored nation (MFN) clause." After Mediacom (in a letter dated February 16, 2016) demonstrated how and why the "Additional Station" provision was not anything like an MFN, NAB (on February 23, 2016) abruptly abandoned that line of argument, stating that whether or not the

[1] Wave Broadband has filed an *ex parte* letter dated March 10, 2016 in which it confirms that it has been presented a number of retransmission consent agreements with similar provisions and discusses how these provisions would effectively circumvent of the limitations on joint negotiations and drive retransmission consent fees higher without the need to give consideration to local market conditions.

provision is an MFN "is immaterial." Instead, NAB fell back on its assertion that because both parties to a retransmission consent negotiation have the power to "say no," there is no reason for the Commission to even consider whether the Additional Station provision described by Mediacom – or for that matter, any provisions or tactics employed during retransmission consent negotiations – constitute a violation of the duty to negotiate in good faith. In other words, NAB's position is that the good faith requirement itself is unnecessary and illegitimate.

Faced with such a patently absurd argument, as well as some *ad hominem* attacks against it by NAB in the trade press, Mediacom resorted to a well-known advocacy technique – the "appeal to ridicule" (*reductio ad ridiculum*) – to rebut NAB's defense of this latest abuse of the retransmission consent regime. For some reason, Mr. Kaplan and NAB concluded that Mediacom's response (which many have found quite entertaining as well as substantive) constituted a major *faux pas* – a "bizarre outburst" that once brought to your attention and the attention of your legal advisors and other senior Commission staff, would cause the Commission to immediately and summarily terminate the instant rulemaking proceeding. (NAB, of course, did not bother to provide you with copies of the correspondence leading up to Mediacom's response, an omission that Mediacom corrects with the attachments to this letter).

Mediacom would have been inclined to let the matter rest but for the fact that NAB's cover letter to you seeks to perpetrate the myth that Mediacom and other proponents of retransmission consent reform refuse to accept that Congress has granted broadcasters a right to "freely negotiate for compensation" for their signals and "no longer bother to offer substantive arguments" in support of their positions. NAB's letter also presents the broadcast industry as the unqualified defenders of competition who have "every incentive" to complete retransmission consent agreements, while the pay TV industry is characterized as price-gouging, blackout-causing enemies of consumers.

The reality, of course, is exactly the opposite of what NAB claims.

First, Mediacom does not question the fact that Congress has authorized broadcasters to seek compensation for the retransmission of their signals; in fact, in a recent *ex parte* meeting with staff from the Media Bureau and Office of General Counsel, Mediacom expressly acknowledged that broadcasters have the right to seek compensation and that Mediacom does not object to paying compensation. However, Mediacom disputes NAB's claim that broadcasters have the right to "freely" negotiate retransmission consent. Notwithstanding what NAB may claim, Congress has made it clear that retransmission consent negotiations are held to a higher standard than ordinary commercial transactions and broadcasters do not have an unfettered right to make unreasonable negotiating demands and engage in unreasonable negotiating tactics.

Second, Mediacom alone has filed hundreds of pages of substantive legal, factual, and policy arguments supporting the need for retransmission consent reform and rebutting NAB's attempts to defend the *status quo*. For example, in its reply comments in this proceeding, Mediacom addressed NAB's repeated assertion that blackouts not only are rare, but also are intentionally engineered by two or three large pay TV companies.[2] As Mediacom pointed out, the number of actual blackouts is limited for the simple reason that the damage from a blackout leaves most operators with no choice but to cave in to the broadcaster's demands.[3] (In this regard, the situation is not unlike that faced by most robbery victims: giving the robber one's wallet is a better option than getting shot). Moreover, even with the incentive to give in, there have been over 500 blackouts since 2012 impacting at least 19 different pay TV distributors – large, mid-sized, and small.[4]

Third, broadcasters are hardly the defenders of competition and consumers that they make themselves out to be. Mediacom has repeatedly pointed out that what is missing from retransmission consent negotiations is the availability of a competitive substitute for the local broadcast station that would serve as a check on prices.[5] The reason there is no competitive check is that the broadcasters refuse to give an inch when it comes to relaxing the broadcast exclusivity rules or imposing limits on contractual provisions that bar an out-of-market station from granting retransmission consent. It is worth pointing out that during the more than six years that the Commission has been considering retransmission consent reform, NAB has never sought to square their current position with their previous declarations that the national broadcast networks would have "no right to dictate [retransmission consent] terms, or to demand any part of the benefits which the local station might obtain from a cable system.[6]

Fourth, NAB's contention that broadcasters have "every incentive" to conclude retransmission consent agreements is part and parcel of NAB's claim that it is the cable operator that has the leverage in retransmission consent negotiations. Of course, if that was true, retransmission consent fees wouldn't be going up at hyper-inflationary rates year after year. The truth is not found in what NAB tells the Commission, it is found in the statements that broadcast executives make to investors and the press, such as "the sky is the limit" when it comes to retransmission consent prices (CBS President Les Moonves); the power to block a

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[2] Reply Comments of Mediacom Communications Corporation, MB Docket No. 15-216 (Jan. 14, 2016) at 12-16.

[3] *Id.* at 12.

[4] *Id.* at 13.

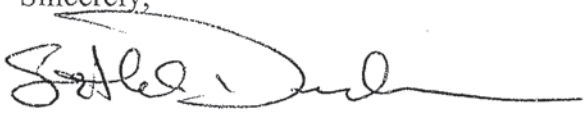
[5] *See generally* Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Bright House Networks LLC, MB Docket No. 10-71 (June 26, 2014); *see also* Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71 (May 27, 2011) at 15-18

[6] See Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71 (May 27, 2011) at 7-8.

pay TV company's access to a local broadcast signal gives that station "the ultimate leverage in retransmission consent negotiations" (Mr. Moonves, again); and retransmission consent fees will continue to increase "forever" (Sinclair Broadcast Group President David Smith).[7]

In conclusion, Mediacom is glad that Mr. Kaplan saw fit to share its March 9, 2016 *ex parte* letter with each of you. Mediacom hopes you will find it both entertaining and substantively illuminating. Mediacom also hopes you will read the other correspondence relating to the broadcast industry's new "Additional Station" tactic as well as Mediacom's comments and reply comments in this proceeding. Mediacom is confident that if you consider the evidence and arguments contained therein you will ignore NAB's request to terminate this proceeding without making changes in your rules and instead adopt one or more of the specific reform proposals that Mediacom and others have suggested.

Sincerely,



Seth A. Davidson
Counsel to Mediacom Communications Corporation

cc: Phil Verveer
Jessica Almond
Holly Saurer
Marc Paul
Matthew Berry
Robin Colwell
Bill Lake
David Grossman

Mediacom

Thomas J. Larsen
Senior Vice President
Government & Public Relations

February 3, 2016

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Communication; MB Docket No. 15-216

Dear Mr. Lake

Notwithstanding the concerns that led Congress to direct the Commission to initiate the above-referenced proceeding to update its rules governing retransmission consent negotiations, the broadcast industry remains intent on exploring new tactics that will have the effect of pushing such negotiations towards a breakdown. I write to describe one such tactic that Mediacom has recently encountered and that Mediacom understands has been encountered by other cable operators as well.

The tactic to which I refer is the insistence by a broadcaster on what might best be described as an after-acquired systems provision on steroids. It is common in retransmission consent negotiation for a broadcaster to demand that the terms agreed to by the parties automatically apply to any stations in which the broadcaster subsequently acquires an attributable ownership interest.

However, some broadcasters are now demanding the right to bring other stations under the terms of their agreements without obtaining any material financial or operational stake in those stations. Specifically, under these "Additional Stations" provisions, the concept of an after-acquired station would be expanded to encompass any station that grants the broadcaster future authority to negotiate retransmission consent on the station's behalf. By virtue of nothing more than this action, the cable operator's pre-existing retransmission consent agreement with the station immediately would terminate and be replaced with the terms of the cable operator's agreement with the broadcaster obtaining the grant of future authority.

In practice, what this provision would do is give the broadcaster a "hunting license" to seek proxies from any other station in any DMA in which the cable operator provides service. This is a far cry from the typical "after acquired" systems provision. To give an example: if Mediacom has an existing agreement with the owner of Station X under which it pays a dollar per subscriber less for carriage than it pays the owner of Station Y, and Station Y obtains Station X's proxy, Mediacom would immediately be required to increase its payment for Station X by one dollar. This new fee structure would not be based on any negotiations relating to the carriage of Station X, would not be related to the type or value of the "services" that Station Y provides Station X, and would not be based in any way on retransmission

consent market conditions in the market served by Station X. The increased fees, of course, would ultimately be paid by consumers, who would not receive anything more in return for their higher payments.

Allowing a broadcaster to demand that a cable operator agree in advance to substitute the terms of their retransmission consent agreement for the terms of the retransmission consent agreements that the cable operator reached with any and all stations without negotiations and without any regard for whether those substitute terms are appropriate for the markets in which they would become applicable flies in the face of the fundamental principles underlying the notion of market-based, good faith retransmission consent negotiations. If the Commission allows this kind of arrangement to stand, there is every reason to expect that within a few years, a mere handful of stations will dictate the terms of retransmission consent for hundreds of unrelated stations in which they have no other material interest. These arrangements will all but write the concept of competitive market considerations out of the retransmission consent process. It will also vastly increase the already considerable leverage that the largest station group owners have in retransmission consent negotiations.

This type of consumer harming behavior deserves the same scrutiny that the Commission applied to the broadcast industry's use of Joint Sales Agreements ("JSAs") in retransmission consent negotiations. As Chairman Wheeler so aptly noted in March 2014, "consumers lose when broadcasters band together."[1] In the case of the "Additional Station" provisions described above, broadcasters do not even have to band together to avoid the one-on-one negotiations intended by Congress. Instead, stations get the benefit of higher prices obtained by another broadcaster without having to negotiate at all. And once again, as with joint negotiations, it is the consumer "who ultimately pays the price."[2]

I strongly urge the Bureau to consider addressing such provisions in the above-referenced rulemaking proceeding.

Sincerely,

Tom Larsen

Cc: FCC Chairman, Tom Wheeler
FCC Commissioner, Mignon Clyburn
FCC Commissioner, Ajit Pai
FCC Commissioner, Michael O'Rielly
FCC Commissioner, Jessica Rosenworcel
FCC General Counsel, Jonathan Sallet

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[1] See https://www.fcc.gov/news-events/blog/2014/03/06/protecting-television-consumers-protecting-competition.
[2] *Id.*

February 10, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Ex Parte Communication, MB Docket No. 15-216

Dear Ms. Dortch:

Mediacom – among the Top 10 largest pay TV companies in the country – has yet again asked the Commission to insert itself into the nitty-gritty details of retransmission consent negotiations.[1] The latest missive, a letter in which it bitterly complains about broadcasters' negotiation practices, follows a long string of similar (and sometimes downright silly[2]) requests to alter the rules governing retransmission consent in their favor. The Commission can and should dismiss Mediacom's complaint as another "sky is falling" ruse from arguably pay TV's most strident advocate,[3] and one of the nation's most consumer-unfriendly companies.[4]

In Mediacom World, broadcasters have all the power. They can impose, or "demand," unilateral conditions on massive pay TV companies, and they gleefully pull their signals before extracting supra-competitive rents. It doesn't take much to recognize that Mediacom World is completely divorced from everyone else's reality. It is a fantasy that appears intended to arouse government sympathy and a shiny object designed to distract everyone,

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[1] Written Ex Parte Communication from Mediacom Comm. Corp. (Mediacom), MB Docket No. 15-216 (Feb. 3, 2016).

[2] *See, e.g.*, Petition for Rulemaking of Mediacom (July 7, 2015), RM-11752; Public Notice, Consumer & Governmental Affairs Bureau, Reference Information Center, Petition for Rulemaking Filed, Report No. 3024 (July 15, 2015) (this oft-ridiculed petition made the completely unsubstantiated and ridiculous assertion that broadcasters were purposefully limiting their over-the-air coverage in order to gain more retransmission consent compensation).

[3] *See, e.g.*, Letter from Joseph E. Young, Senior Vice President, General Counsel & Secretary of Mediacom Comm. Corp., MB Docket No. 10-71 (filed July 26, 2015) (comparing NAB to Nazi propagandists that painted "Poland as the aggressor"); *see also*, Letter from Rocco Commisso, Chairman and Chief Executive of Mediacom, to FCC Chairman Tom Wheeler (July 7, 2015) (saying that the Commission's "refusal to become involved in specific disputes combined with an unwillingness to adopt corrective regulations add up to a do-nothing policy").

[4] *See, e.g.*, Daniel Frankel, "Mediacom wins race to bottom of customer service rankings for bundled services, edging TWC," FierceCable.com (June 1, 2015) (citing a Consumer Reports consumer survey on telecommunications services that found "20 out of 24 pay-TV service providers had the lowest scores for value").

including their customers, from Mediacom's long list of customer service challenges. As we noted in our comments, because broadcasters do not have undue bargaining power vis-à-vis pay TV providers, there is no reason for the Commission to even consider injecting itself into a quagmire of everyday negotiations between sophisticated business entities.[5]

In this instance, Mediacom complains about a proposal that is the rough equivalent of a most favored nation (MFN) clause. This particular complaint is rich, given that MVPDs pioneered the use of MFNs in retransmission consent agreements, squeezing dollar after dollar out of smaller broadcasters along the way. Moreover, and unsurprisingly, Mediacom offers no evidence of the practice that it claims is prevalent. Most likely, Mediacom is mischaracterizing proposals made by broadcasters, which were originally intended to cover joint sales agreements, to support its argument that all-powerful local broadcasters have run amuck.

The most notable thing about Mediacom's latest filing is that it proves NAB's point throughout this proceeding: the longer the Commission holds up the flypaper of retransmission consent reform, the more flies it will attract. It's time to close this proceeding, zap the flies and allow the parties to focus on negotiating with each other rather than the FCC.

Respectfully submitted,

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs
National Association of Broadcasters

[5] See Comments of NAB, MB Docket No. 15-216, at 8-22 (Dec. 1, 2015).

Mediacom

Thomas J. Larsen
Senior Vice President
Government & Public Relations

February 16, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: NAB Ex Parte Communication, MB Docket No. 15-216

Dear Ms. Dortch:

Rick Kaplan, NAB's General Counsel and Executive Vice President of Legal and Regulatory Affairs, recently submitted a letter to the Commission dated February 10, 2016, in the above referenced docket. Mr. Kaplan's letter was critical of Mediacom's efforts to draw the Commission's attention to a new tactic used by broadcasters during retransmission consent negotiations referred to as "Additional Station" provisions.

After reading this latest slapdash attempt by NAB to discredit Mediacom's call for retransmission consent reform, I am beginning to think that the folks at NAB believe the "N" in their name stands for "know-it-all" – as in the kind of people who obnoxiously purport expansive understanding of a topics and/or situations when in reality their comprehension is flawed or limited. Case in point, the very first sentence of Mr. Kaplan's letter begins by inaccurately describing Mediacom as a being "among the Top 10 largest pay TV companies in the country."[1] The letter then attempts to portray Mediacom as operating in some alternate universe where the consumer harming actions of the broadcast industry, like the record 193 station blackouts in 2015 and the incomprehensible 22,400% increase in retransmission consent revenues since 2005, are simply imagined.

With all the sincerity of an age and scale operator attempting to separate a hard-earned dollar from an unwitting carnival patron, Mr. Kaplan then moves on to argue that the "Additional Station" issue Mediacom brought to the attention of the Commission "is the rough equivalent of a most favored nation (MFN) clause." He writes, "[m]ost likely, Mediacom is mischaracterizing proposals made by broadcasters, which were originally intended to cover joint sales agreements."

Rather than let Mr. Kaplan's uninformed guess lie unchallenged in the record of this docket, we thought it best to share an example of an actual "Additional Station" provision that became a sticking point during recent retransmission consent negotiations between Mediacom and a

[1] The Top 10 largest pay TV providers in the U.S. are as follows: 1) AT&T/DirecTV, 2) Comcast, 3) Dish Network, 4) Time Warner Cable, 5) Verizon, 6) Charter, 7) Cox, 8) Cablevision, 9) Bright House Networks, and 10) Altice/Suddenlink.

large broadcast station owner. However, to protect the guilty, we have made cosmetic changes to the language in order to hide the identity of the broadcaster responsible for drafting the below language:[2]

> *If Station Owner acquires or obtains authority to negotiate retransmission consent on behalf of any television station that is licensed to a DMA served by MVPD (such station, an "Additional Station"), then if Station Owner so elects, this Agreement shall be expanded to include such broadcast television station as a "Station" for all purposes of this Agreement and any pre-existing retransmission consent agreement of MVPD with respect to such Additional Station shall terminate with respect to the carriage of such Additional Station.*

On its face, that language precludes interpreting it as an MFN. Moreover, unlike Mr. Kaplan, who was not present for the negotiations over that language, Mediacom's employees heard the broadcaster's explanation of what it thought the language meant, which was exactly what we informed the Commission in our original letter. There is absolutely no doubt of that because the language was the subject of numerous discussions and email exchanges between the parties that continued to the very brink of the expiration of Mediacom's retransmission consent agreement. Moreover, we have been advised that other broadcasters have demanded similar language from other MVPDs.

As has been true so many times before, NAB, for some reason, thinks that it is competent to speak to issues that arise in negotiations to which it was not a party, and its penchant for pretending to know more than it does has once again created an unfortunate diversion from the merits of the issue at hand.

In order to alleviate the confusion created by Mr. Kaplan's letter, we thought it would be helpful to explain the differences in the operation of MFN clauses and the above "Additional Stations" language. MFNs granted to a broadcaster in a retransmission consent agreement are used to assure that if the MVPD grants another broadcaster more favorable price or non-price terms in a separate agreement, then the first broadcaster will get the benefit of those more favorable terms for its own stations. That is not what "Additional Station" provisions of the kind we have brought to the Commission's attention do. Here are two examples that illustrate the difference:

MFN: Station Owner A negotiates a retransmission consent agreement with Mediacom under which the retransmission consent fee in each of the next three years is $2 per subscriber and that includes a price term MFN. If Mediacom already has, or enters into, an agreement with Station Owner B that provides for a fee of $2.50 per subscriber, then Station Owner A's MFN means that Mediacom must increase the fee it pays Station A to $2.50. If the Agreement with Station Owner B is for a fee of $2 or less, its fee payable to Station A does not change.

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[2] Because numerous broadcasters have threatened us with horrendous consequences if we dare to share contractual language with the Commission or Congress, we have made non-substantive changes to the language to prevent it from being identified with a specific station owner. The modifications do not affect the substance of the operative language relevant to the issue addressed in this letter. We would be happy to share the unaltered language if requested to do so by the Commission.

"Additional Station" Provision: Station Owner A negotiates a retransmission consent agreement with Mediacom under which the retransmission consent fee in each of the next three years is $2 per subscriber and which contains an "Additional Station" provision. Mediacom already has an agreement in place with Station Owner B under which it pays a retransmission consent fee during the same period of $1 per subscriber. Station Owner A does not own or manage Station Owner B or any of its stations. Station Owner A tells Station Owner B the following: "I can get you a $2 per subscriber retransmission consent fee from Mediacom and all you have to do is sign a piece of paper that tells Mediacom that you authorize Station Owner A to negotiate retransmission consent for Station Owner B's stations during the term of your existing agreement (and not beyond). You do not have to give us any equity in Station Owner B, give us any management authority or hire us to perform any services—all you have to do is sign that simple document. If Mediacom is paying you less than $2 per subscriber, doing this will be to your economic advantage. For providing you with this opportunity, we ask only that we receive 25% of the extra money you get from Mediacom. This is a win-win deal for both of us." If Station Owner B signs the piece of paper, then its retransmission consent fees increase by 75 percent, notwithstanding the fact that it is already subject to a valid retransmission consent agreement with Mediacom and notwithstanding that there is no ownership or business relationship between Station Owner A and Station Owner B other than splitting the extra money that Mediacom will be forced to pay. And the owner of Station A gets $0.25 per month for every subscriber receiving Station B, even if the owner of Station A doesn't operate a station serving the subscribers who will end up paying that extra $0.25.

Clearly, the language we have brought to the Commission's attention is not an MFN by any stretch of the imagination. It also is much different from provisions that, historically, broadcasters have used to bring under their retransmission consent agreements those stations which they do not have de jure control but over which they exercise extensive management authority under an LMA or other contractual relationship. By contrast, the new language does not require that the broadcaster have any management authority whatsoever over the additional stations, let alone a level that might plausibly be used as a justification for representing the additional stations in retransmission consent negotiations. The specific broadcaster who proposed the new language to Mediacom said that the difference in wording was intentional and not due to an inadvertent omission or drafting error.

We certainly hope the above examples dispel any doubt Mr. Kaplan's letter may have created about how "Additional Station" provisions are intended to function. Once again, we urge the Commission to address such provisions in the above-referenced rulemaking proceeding.

Sincerely,

Tom Larsen

Cc: Media Bureau Chief, William T. Lake

NAB
NATIONAL ASSOCIATION OF BROADCASTERS

February 23, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Ex Parte Communication, MB Docket Nos. 15-216 and 10-71

Dear Ms. Dortch:

In a classic exhibit used in early 20th century traveling carnivals called the "Girl in the Fishbowl," viewers were sold on the idea of seeing a five-inch girl (often dressed as a mermaid) living in a tiny underwater grotto. For a penny, viewers could look through a small hole to see what appeared to be a miniature girl swimming in her aquatic home. In actuality, a life-sized girl was swimming in a pool behind a lens that distorted the view to make her seem much smaller.

In several letters in these proceedings,[1] Mediacom, one of the nation's larger pay TV operators,[2] attempts to create a similar illusion – although in reverse. Evoking carnival imagery,[3] it has taken something very small – a proposed term in a contract negotiation – and turned it into something colossal. And like a carnival barker, it hopes to use this illusion to support fantastic tales designed to encourage the Commission to come rushing to its aid as they negotiate private contracts with local broadcasters.

Save your penny, FCC. Mediacom's illusion is not worth the price of admission.

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[1] See Letter from Thomas J. Larsen, Senior Vice President, Mediacom Comm., MB Docket No. 15-216 (Feb. 16, 2016) (Mediacom Feb. 16 Letter); see *also* Letter from Thomas J. Larsen, Senior Vice President, Mediacom Comm., MB Docket No. 15-216 (Feb. 3, 2016) (Mediacom Feb. 3 Letter).

[2] In a previous letter, NAB described Mediacom as being "among the Top 10 largest pay TV companies in the country." Mediacom counters that it is actually the 11th largest pay TV operator. See Mediacom Feb. 16 Letter at FN1. As if 10 versus 11 makes a material difference, we note that the discrepancy likely comes from the fact that Mediacom views Bright House Networks as a stand-alone company and not majority-owned by Time Warner Cable (TWC). [Bright House Networks, LLC, is technically a limited liability company whose only member is an entity called Time Warner Entertainment-Advance/Newhouse Partnership, owned 33% by "Advance/Newhouse" and 67% by TWC. See "Public Interest Statement" of Charter Comm., MB Docket No. 15-149, at FN19 (June 25, 2015)]. Moreover, Mediacom will soon move up the charts yet again once the Charter Communications deal with Time Warner Cable and Bright House Networks closes.

[3] The carnival theme is the latest in Mediacom's parade of comical metaphors, which have compared the broadcast industry and its representatives to Nazis, drunk drivers, and now, "Age and Scale" operators. See, e.g., Letter from Joseph E. Young, Senior Vice President, General Counsel & Secretary of Mediacom Comm. Corp., MB Docket No. 10-71 (July 26, 2015) (comparing NAB to Nazi propagandists that painted "Poland as the aggressor").

In its latest letter,[4] Mediacom again attempts to demonize an apparent proposed term in a contract negotiation it dubs the "Additional Station" provision. It suggests that this term, which broadcasters apparently "demand," would set off a cascade of increased retransmission consent fees as one broadcaster becomes the would-be agent for all other broadcasters.[5]

We noted in our initial response to Mediacom's complaint how this provision, as described, is akin to a most favored nation (MFN) clause, a common provision that pay TV operators pioneered in retransmission consent negotiations.[6] Mediacom countered that this provision is "not an MFN by any stretch of the imagination,"[7] which is quite a surprise because Mediacom has shown itself to be quite imaginative.[8]

The question of whether or not this provision is, in fact, an MFN is immaterial. As a threshold consideration, what matters is that broadcasters have no ability to unilaterally demand terms and conditions from pay TV operators like Mediacom. Mediacom's carnival-themed letter is appropriate because it relies on yet another illusion that pay TV operators have no choice but to accept whatever terms a broadcaster seeks in a negotiation. Yet pay TV advocates have completely failed to prove – indeed, Mediacom doesn't even attempt to[9] – that there exists a gross disparity in bargaining power between broadcasters and multichannel video programming distributors (MVPDs). And without that demonstration there is no reason for the Commission to even consider circumscribing what parties may bargain for in a negotiation. Every party to these negotiations has the power to say no.

Notably, Mediacom neglects to inform the Commission whether or not it accepted the phantom broadcaster's proposal. Was the condition unilaterally imposed on Mediacom? And if it accepted it, has it been used in the manner in which Mediacom claims it was intended?

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[4] Mediacom Feb. 16 Letter.

[5] Mediacom Feb. 3 Letter.

[6] See Letter from Rick Kaplan, Executive Vice President and General Counsel, National Association of Broadcasters, MB Docket No. 15-216 (Feb. 10, 2016).

[7] Mediacom Feb. 16 Letter.

[8] Mediacom, the poster child for self-serving behavior in the pay TV industry, has a very clear record of trying almost anything to convince the Commission that broadcasters are evil and that a retransmission consent overhaul is necessary. For example, it lambasted the FCC for failing to inject itself into the free market. See Letter from Rocco Commisso, Chairman and Chief Executive of Mediacom Comm. Corp., to FCC Chairman Tom Wheeler (July 7, 2015) (saying that the Commission's "refusal to become involved in specific disputes combined with an unwillingness to adopt corrective regulations add up to a do-nothing policy."). It also filed an oft-ridiculed petition for rulemaking this past summer arguing that broadcasters should be forced to allow retransmission of their signal if their over-the-air signal does not reach 90 percent of viewers in the market. Petition for Rulemaking of Mediacom Comm. Corp., RM-11752 (July 7, 2015).

[9] Mediacom will no doubt claim that increases in retransmission consent fees prove a disparity in bargaining power. That claim has no merit on its face. Not only are the numbers it uses entirely misleading – it's not hard to come up with an outlandish percentage increase when compensation began at zero – but growth in rates can occur for many reasons. Most notably, marketplace equilibrium that occurs after a former-monopoly provider faces some competition hardly proves a gross disparity in bargaining power, especially considering that broadcasters, like all programmers, face far more competition now than they did a decade ago.

The essential truth missing from Mediacom's complaint is that negotiations between sophisticated businesses naturally involve many proposed terms. That's how deals get done. Terms are presented, rejected, modified, compromised and finalized in every negotiation, and each negotiation and final deal is highly specific to the businesses involved. The terms in each negotiation also evolve as the industries evolve. That's why the Commission's current and flexible totality of the circumstances test remains the most practical way to effectuate its statutory duty.

Parties are free to propose and negotiate for any terms and conditions they wish, including terms and conditions that are contingent on changing facts. If Mediacom wants to include a term that varies a broadcasters' compensation depending upon whether it airs enough carnival-related programming, for example, there is no legal reason it cannot propose this. And there shouldn't be. Parties can negotiate for any contingency. For example, the model retransmission consent agreement published by ACA for its membership[10] encourages members not to pay any money for retransmission consent to a station that loses its affiliation with one of the four major broadcast networks.[11]

To accede to Mediacom and pay TV's demands for a retransmission consent overhaul would require the Commission to delve deeply and frequently into the quagmire of thousands of negotiations and to judge the validity of tens of thousands of different proposed terms, even those terms that are never accepted. Companies like Mediacom will play this endless "gotcha" game to gain a regulatory advantage. And to what end? Having the Commission stand over every negotiation will only slow down the process and almost certainly result in more, not fewer, disputes.

Respectfully submitted,

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[10] American Cable Association (ACA) Model Retransmission Consent Agreement, available at: http://www.americancable.org/files/images/ACA-RTC_Sample_Agreement_111005.doc (viewed Feb. 17, 2016).

[11] *Id.* at 9(b) ("For any Station affiliated with a Big 4 Network on the Agreement Date, Cable Operator may terminate this Agreement upon 30 days notice to Broadcaster if the Station fails to maintain its Big 4 Network affiliate.").